United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

ORIGINAL

75-1055

B
Pgs
6

United States Court of Appeals

For the Second Circuit.

THE UNITED STATES OF AMERICA,

Appellee,

v.

JAMES McKETHAN,

Defendant-Appellant.

On Appeal From The United States District Court
For The Southern District of New York

Appellant's Brief

GOLDBERGER, FELDMAN & BREITBART
Attorneys for Defendant-Appellant
401 Broadway
New York, N.Y. 10013
(212) 925-2105

Dick Bailey Printers • P.O. Box X, Staten Island, N.Y. 10302 • Tel.: (212) 447-5358

TABLE OF CONTENTS

TABLE OF CASES

OTHER AUTHORITIES

STATEMENT OF ISSUES

1. Whether the evidence of appellant's participation in the substantive charge was insufficient to sustain the conviction.

2. Whether the evidence linking McKethan to the pre-existing conspiracy is insufficient as a matter of law.

3. Whether the independent non-hearsay evidence that appellant was part of the conspiracy charged was insufficient to permit the admission into evidence of the hearsay declarations of an alleged co-conspirator.

4. Whether the use of the hearsay declarations of alleged co-conspirators denied appellant his Sixth Amendment right of confrontation.

5. Whether the prosecutor's summation was improper.

PRELIMINARY STATEMENT

This appeal is taken from a judgment of the United States District Court for the Southern District of New York, rendered on January 30, 1975, (Hon. John M. Cannella, D.J.) convicting appellant of the crimes of conspiracy to violate the narcotics laws and a sale of narcotics, and sentencing him to a three year term of imprisonment on each charge, said sentences to run concurrently.

STATEMENT OF FACTS

On December 16th, 17th and 18th, 1974, appellant was tried before a jury (Cannella, D.J.)

THE TRIAL

On or about August 22, 1974, Agents Richard Scovel and Harry Barton, began an investigation of Anthony Simon. Pursuant to the investigation, a government informer in Boston called Anthony Simon in New York. An arrangement for a sale of two ounces of heroin was made. Accordingly, the informant rented a hotel room in Boston. Later that evening, David Stewart arrived at the hotel room and Agent Scovel purchased two ounces of heroin for $2000.00.

During the next few days, the informant and Agent Scovel spoke to Anthony Simon by telephone. Another sale was arranged to take place on August 28, 1974, again in Boston and under the same circumstances as the first sale. This second sale was completed and arrangements were made in Boston, directly between Anthony Simon

and the two agents, for a further sale. It was agreed that Simon would sell a kilo of heroin to the two agents. Simon stated that he would have to call his man to set up the deal (54)*. The sale was set for September 4, 1974, in New York City.

When the agents arrived in New York City, they called Anthony Simon and told him that they had arrived. They then rented a hotel room at the Skyline Motor Inn. Agent Barton called Anthony Simon, through a female intermediary, and let him know where he would be and that he would meet Anthony at 8:30 p.m. in the hotel lounge.

At approximately 8:15 p.m., on September 4, 1974, McKethan's Cadillac was seen in front of the Skyline (76). McKethan and Charles Simon were in the car, McKethan was driving (77-78). They remained in the car about five minutes before Charles left the car and went into the Skyline (78). Five minutes later, Charles came out of the hotel and got back into the Cadillac (78). The Cadillac then drove away from the scene (78).

At about 8:50 p.m., Anthony Simon arrived at the Skyline and entered (79).

At approximately 8:55 p.m., Anthony Simon entered the lounge. He sat down and spoke to Barton. He told Barton that the sale

---

* References are to the typewritten minutes of trial.

would take place at the Van Cortlandt Motel. Barton balked at the change of location (58). Anthony then called his brother to see if the sale could be completed at the Skyline (58-59). After making the call, Anthony returned to Barton's table and told him that his brother, Charles Simon, and another man would bring the heroin to the Skyline Hotel (59). As part of the deal, Anthony was taken up to the hotel room and shown $35,000.00 (59). After a few minutes conversation, Anthony said that his brother and the other man must have arrived and he left to meet them (60).

At about 9:40 p.m., Anthony left the Skyline Hotel, as he did McKethan's Cadillac pulled up in front. Anthony made a motion with his hand and McKethan motioned in a similar manner (79-80). Anthony then got into the car and it pulled away (80). The car stopped at 49th Street, near Tenth Avenue. McKethan handed a key to Anthony. Charles and Anthony got out of the car. Anthony opened the trunk and pulled out a tan raincoat. Charles then took a brown paper bag out of the trunk and gave it to Anthony, who wrapped the raincoat around it. Charles then got back into the Cadillac and the car drove off (80-84). It finally pulled to the curb and parked in front of the Skyline Hotel (84). In the meantime, Anthony went up to the hotel room, completed the sale and was arrested (60-61). This was radioed to the agents on the street, who then arrested McKethan and Charles Simon (85). While Charles was being removed from the car, McKethan was heard to say, "Hell,

who are you? Man, you ain't got nothing on me. Where is the stuff?" (87)

At DEA headquarters, after his arrest, McKethan told the agents that he had no idea of what had been going on. He further stated that, "nothing came out of (his) trunk." (131-132).

During the summation the prosecutor stated:

> McKethan said, "Who are you man? I didn't do nothing. Where is the stuff?"
>
> That, to me, would mean one thing only: "I don't have the narcotics on me. The narcotics are up with Tony Simon." (170)

ARGUMENT

POINT I

THE EVIDENCE OF APPELLANT'S PARTICIPATION IN THE SUBSTANTIVE CHARGE WAS INSUFFICIENT TO SUSTAIN THE CONVICTION.

The only evidence against McKethan was that he was an unarmed chauffeur of the automobile which brought Charles Simon to the Skyline Motel.

In United States v. Steward, 451 F.2d 1203 (2d Cir., 1971), defendant Sands drove his co-defendant Steward to a tavern, where they met Mabel and Steven Wooden. Sands then drove Steward to a motel; the Woodens followed in their car. Undercover agents were waiting for them to arrive. Wooden and Steward had sold drugs to the agents on two prior occasions. Wooden met with one of the agents and was shown $15,000.00. Wooden told the agent that his people downstairs had their guns. Wooden and the agent went to the parking lot. Steward was standing by the Sands' car. A conversation ensued and the agent and Wooden returned to the motel. Shortly thereafter, Steward arrived in the room with the drugs and was arrested. Later, other agents approached Sands, who was sitting in the Wooden's vehicle. As they did so, Sands tried to pull out a gun, but surrendered it to the police.

This Court stated:

> But Sands was never observed in any of the prior dealings and was not in the room when the arrest was made. McMullan (an agent) testified that he never saw him until the day of the trial. There

> is no evidence at all to show that Sands knew that illegally imported drugs were involved. He was never observed handling the drugs, setting the price or in any way exercising the degree of control which has heretofore been required in these cases. In short, we find that the evidence was insufficient to establish the mens rea required for a conviction. Id. at 1207.

The facts of this case are remarkably similar. The only difference is the statement, "Where is the stuff?" made by McKethan at the time of his arrest. However, for two reasons this is a difference without meaning. First, the statement itself is ambiguous and it is impossible to draw any clear inference of guilt from it. The prosecution may have felt that its meaning was clear but the record does not support this. Second, in Steward, Sands' attempt to pull out the gun was clearer indication of a mens rea than McKethan's statement. Yet, it was not sufficient to justify the conviction.

So too, the post arrest statement is so ambiguous as to what was meant that it adds little, if any, weight to the evidence.

In fact, Steward presents a stronger case than this one. Sands had a gun, here McKethan had none. In both cases the seller of the drugs made references to "his people" or "my man" waiting downstairs. If the evidence in Steward was not enough to convict, neither is the evidence here. See also, United States v. Infanti, 474 F.2d 522, 526 (2d Cir., 1973); United States v. Jones, 308 F.2d 26 (2d Cir., 1962) (en banc); United States v. Vilhotti, 452 F.2d 1186, 1188-1189 (2d Cir., 1971).

One case has stated that Steward holds there are three indicia of constructive possession:

> "(C)onstructive possession is found only where the defendant has set the pace for the sale, or was able to assure delivery or had the final say as to the means of transfer." United States v. Heng Awkak Roman, 356 F.Supp. 434, 436 (S.D.N.Y.1973) aff'd 484 F.2d 1271 (2d Cir.,) cert. den. 415 U.S. 976.

None of these indicia are present here and there can be no finding of constructive possession and the conviction cannot be sustained.

POINT II

THE EVIDENCE LINKING McKETHAN TO THE PRE-EXISTING CONSPIRACY IS INSUFFICIENT AS A MATTER OF LAW.

The evidence in this case established only that appellant, in one instance, chauffeured a member of the conspiracy. Even if illegal, this conduct did not make him a member of the conspiracy charged.

Conspiracy indictments for this type of peripheral activity are precisely the sort for which the courts have shown concern.

> The distinction is especially important today when so many prosecutors seek to sweep within the dragnet of conspiracy all those who have been associated in any degree whatever with the main offenders. That there are opportunities of great oppression in a doctrine is very plain, and it is only by circumscribing the scope of such all comprehensive indictments that they can be avoided. United States v. Falcone, 109 F.2d 579, 581 (2d Cir.) aff'd 311 U.S. 205 (1940).

Grunewald v. United States, 353 U.S. 391, 404 (1957):

> " Prior cases in this court have repeatedly warned that we will view with disfavor attempts to broaden the already pervasive and wide-sweeping nets of conspiracy prosecutions." At 404

The Supreme Court of the United States in Direct Sales Co. v. United States, 319 U.S. 703, 711 (1943): "charges of conspiracy are not to be made out by piling inference upon inference thus fashioning . . . a dragnet to draw in all substantive crimes."

The defendant's knowledge of the existence of others and of the conspiracy itself must be clear, not equivocal, and must demonstrate his specific extent to knowingly join the conspiracy. Where conflicting "inferences are equally valid, the defendant is entitled to the one which favors (him)." Chavez v. United States, 275 F.2d 813, 817 (9th Cir. 1960); Miller v. United States, 382 F.2d 583, 587 (9th Cir., 1967). As the court said in Chavez, supra, at 817, the prosecution must show "some knowledge, explicit or implied, in each defendant of the principal purpose of the conspiracy and some act or action indicating participation therein."

In Direct Sales Co. v. United States, supra, a case involving the sale of morphine through the mail, the defendant, who was engaged in repeated large sales of morphine, alleged that he did not intend to join and participate in a conspiracy to distribute morphine. The court found that though there:

> may be circumstances in which the evidence of knowledge is clear, yet the further step of finding the required intent cannot be taken. Concededly, not every instance of sale of restricted goods, harmful as are opiates, in which the seller knows the buyer intends to use them unlawfully, will support a charge of conspiracy.

This case falls within the ruling of Direct Sales Co. The evidence introduced against McKethan does not fairly permit a finding that he knowingly entered an overall conspiracy. It is clear from the testimony, that the entire conspiracy was already established, and needed nothing to be completed.

In addition, the evidence fails to establish that McKethan participated in any meaningful way in the conspiracy. In United States v. Falcone, supra, it was proved that the defendant sold sugar and material for making beer to members of a distilling ring, with knowledge that the materials would be used for an illegal purpose. The Supreme Court in affirming the opinion of Judge Hand, held that a mere purchase or sale does not establish the defendant's knowing entry into an illegal venture, since such a sale does not confirm his "stake in the venture." Moreover, knowledge that goods are to be used for an illegal purpose does not establish that the defendant knew of the conspiracy itself, or willfully associated himself with it. See also, United States v. Peoni, 100 F.2d 401 (2d Cir.,1938).

As Judge Learned Hand said in United States v. Reina, 242 F.2d 302, 306 (2d Cir.), cert. denied sub.nom. Moccio v. United States, 354 U.S. 913 (1957), sales may be evidence of either participation in a conspiracy or random transactions with an independent peddler. The court in Reina found that evidence regarding the source of supply was equivocal and therefore, insufficient for conviction. The evidence is certainly equivocal in this case.

This circuit recognized that transactions with conspirators can in some instances be a participation in the conspiracy and in others not. The key is the nature of the transaction.

In United States v. Aviles, 274 F.2d 179 (2d Cir.), cert. denied 362 U.S. 974 (1960), the defendant was acquitted of participating

in a conspiracy on the basis of evidence that he accepted a delivery of narcotics, and on another occasion pointed out the person to whom a member of the conspiracy was to make a delivery. On this evidence, the court found that there was no clear proof of more than a single delivery to the defendant, and no suggestion of any conversations or other manifestations by the conspirator through whom he participated which might have given him knowledge as to where the drug was obtained. The court further held, in reversing the conviction, that while it may be assumed that the defendant knew the narcotics were illegally imported, there was insufficient evidence to show that he knew that the person with whom he dealt was an agent for an existing conspiracy.

This Circuit applied the Aviles rule in United States v. De Noia, 451 F.2d 979 (2d Cir., 1971), a case where evidence of the defendant's unity with the purposes of the conspiracy was uncommonly strong. De Noia delivered to a conspirator, at a preplanned time and place, a bag of heroin; he was fully aware of what he was doing and what the bag contained. Despite this, his conviction for conspiracy was reversed. If this kind of activity cannot sustain a conviction, then certainly McKethan's actions cannot either. See, United States v. Tramunti, ___F.2d___(2d Cir., 1975); slip.op. 2107, p.2149-2150 (3/7/75).

It is clear, that the wealth of evidence tending to corroborate the government's witnesses with respect to the activities of

the Simon brothers was prejudicial on the substantive count as well.

POINT III

THE INDEPENDENT NON-HEARSAY EVIDENCE THAT APPELLANT WAS PART OF THE CONSPIRACY CHARGED WAS INSUFFICIENT TO PERMIT THE ADMISSION INTO EVIDENCE OF THE HEARSAY DECLARATIONS OF AN ALLEGED CO-CONSPIRATOR.

The testimony directly implicating McKethan comprises a very small portion of the criminal activity charged. The bulk of the conspiracy concerned the activities of the Simons, including numerous hearsay declarations pertaining to their drug transactions. The government relied heavily on these hearsay statements to prove the underlying conspiracy. Appellant contends that there was insufficient independent evidence of his participation in the conspiracy to permit the use of these declarations against him.

The co-conspirator exception to the hearsay rule is generally stated as: "Any act or declaration by one co-conspirator committed in furtherance of the conspiracy and during its pendency is admissible against each and every co-conspirator provided that a foundation for its reception is laid by independent proof of the conspiracy." Levie, Hearsay and Conspiracy, 52 Mich L.Rev. note 17 at p. 1161 (1954). Three conditions must be met before such hearsay evidence is deemed admissible: 1) furtherance; 2) pendency; and 3) foundation or independent proof of the existence of the conspiracy and the connection of the declarant and defendant with it. Litwak v.

United States, 344 U.S. 604 (1953); Krulewitch v. United States, 336 U.S. 440 (1949); Glasser v. United States, 315 U.S. 60 (1942)

It is the last of the above-named conditions to which this argument is directed. In United States v. Geany, 417 F.2d 1116 (2d Cir., 1969) cert. denied sub nom. Lynch v. United States, 397 U.S. 1028, this court stated the role of the trial judge in determining the admissibility of a co-conspirator's hearsay declaration as:

> . . .the judge must determine, when all evidence is in, whether in his view, the prosecution has proved participation in the conspiracy, by the defendant against whom the hearsay is offered, by a fair preponderance of the evidence independent of the hearsay evidence. If it has, the utterances go to the jury ... If it has not, the judge must instruct the jury to disregard the hearsay or, when this was so large a proportion of the proof as to render a cautionary instruction of doubtful utility ... declare a mistrial if the defendant asks for it. At 1120.

It is apparent that in order for hearsay declarations of an alleged co-conspirator to be admissible into evidence, the prosecution must sustain its burden of proving defendant's participation in the conspiracy by "a fair preponderance" of the non-hearsay evidence.

In United States v. Calabro, 449 F.2d 885 (2d Cir., 1971), cert. denied, 405 U.S. 928 (1972), this Court discussed what the "fair preponderance" test meant.

> However, it is clear that the test of "a fair preponderance of the evidence" established by United States v. Geany, supra, 417 F.2d at 1120, can be satisfied by a lesser amount of proof than is required to justify submission of a conspiracy charge to the jury. As we stated in United States v. Ross, 321 F.2d 61, 68 (2d Cir.,) cert. denied 375 U.S. 894 (1963), "The amount of proof aliunde as to the existence of the conspiracy that is required to render such evidence admissible is not as high as the amount needed to warrant submission of a conspiracy charge to the jury." And in United States v. Ragland, 375 F.2d 471, 477 (2d Cir., 1967), cert. denied, 390 U.S. 925 (1968), Judge Waterman wrote that, "The threshold requirement for admissibility is satisfied by a showing of a likelihood of an illicit association between declarant and the defendant although it might later eventuate that evidence so admitted proves to be insufficient to justify submitting to the jury on the issue of defendant's alleged guilty involvement with the declarant." Accord, United States v. Borelli, 336 F.2d 376, 387 (2d Cir., 1964), cert. denied sub nom Mozavano v. United States, 379 U.S. 960 (1965)." At 889.

The non-hearsay evidence in this case falls short of the "threshold" stated by Judge Waterman in Ragland and was not sufficient to sustain the government's burden of establishing McKethan's participation in any conspiracy. Here, McKethan was proven to be no more than an isolated chauffeur; for the reasons given in Point II, this showing did not establish his membership in the conspiracy. Further, the evidence did not show even a "likelihood" of McKethan's "illicit association" with the conspiracy charged, since the bare fact of the chauffeuring does not by itself, permit any inference of membership or participation.

The prosecution did not sustain its burden and the hearsay declarations should not have been admitted into evidence. United States v. Fantuzzi, 463 F.2d 638 (2d Cir., 1972); See United States v. Reina, 242 F.2d 302 (2d Cir., 1957), cert. denied sub nom Moccio v. United States, 354 U.S. 913.

An examination of some of the cases in this area shows that this case presents a fact pattern insufficient to have justified the admission into evidence of co-conspirator hearsay.

In order to gain some clarification as to where this "threshold" of admissibility begins, a recent case before this Court should be examined. Its importance lies not only in its evaluation of a set of facts but, more importantly, inthis Court's statement that it presented a close question; it is thus an accurate guideline. In United States v. Calabro, 449 F.2d 885 (2d Cir., 1971), cert. denied 405 U.S. 928, the defendant's girlfriend consummated one sale of narcotics to an undercover agent and attempted to consummate a second transaction. Each time the girlfriend met with the undercover agent the defendant Calabro was present. The first time the agents came to the La Barraca Bar which Calabro and his girlfriend frequented, Calabro asked an unidentified male who his girlfriend was sitting with. He eyed the agents intensely during their conversations and when one agent went to the men's room Calabro and another man followed him and frisked him in the men's room. In addition, Calabro and his girlfriend were seen conferring

shortly before she was scheduled to meet the agents to transfer narcotics. In spite of Calabro's suggestive behavior, this Court found the issue of Calabro's participation in the conspiracy by a fair preponderance of the evidence to be a close one.

In United States v. Stromberg, 268 F.2d 256 (2d Cir.1959), cert. denied sub nom. Lessa v. United States, 361 U.S. 863, Samnick and Dennis were two customs agents who were seen on various occasions with members of a conspiracy to smuggle narcotics. They made remarks about the ease of smuggling and one of the conspirators stated that Samnick was "one of his customs men." A check was drawn by a conspirator which was said to be for Samnick. Samnick and Dennis were frequently in the office of the conspirators and were frequently entertained by them. Samnick also had helped one of the conspirators get an item through customs though it was a legitimate transaction. On this set of facts this court held that the independent non-hearsay evidence was insufficient to warrant admission of hearsay declarations.

So also, in United States v. Fantuzzi, supra, this Court held the following fact pattern to be sufficient. As evidence that Bruno was a participant in the conspiracy, the prosecution relied upon testimony relating to Bruno's two or three visits in the company of Claudine (a conspirator) to Kitty's (a conspirator) apartment during the week previous to a transaction that took place in Dallas. While Bruno was in the apartment, the other members of the conspiracy showed a familiarity with him by refering to him by

nicknames and by continuing to sniff cocaine while he was there. There was also Landretta's testimony that on Bruno's first visit to the apartment, he asked upon seeing Jose, "Who is that guy?" and on his second visit to the apartment, Lucho and Bruno went into the kitchen where Lucho was heard to say, "You have to wait, because the stuff of cocaine is coming soon."

These cases show the type of evidence required to legitimate the use of a co-conspirator's hearsay declarations. The evidence in this case when compared to the above cases falls short of the required amount of non-hearsay proof. If, as this court stated, Calabro is a close case, then this case does not support the finding below.

During the time these hearsay declarations were made by the conspirators, McKethan was not present, so that no theory of adoptive admissions can be used to justify the use of those declarations at trial. See, United States v. Geany, 417 F.2d 1116 (2d Cir. 1969), cert. denied sub nom. Lynch v. United States, 397 U.S. 1028.

The admission of these hearsay declarations was certainly not harmless error, because the hearsay statements made to Barton by Anthony Simon[1] formed an essential ingredient in the attempt to show the overall conspiracy. This was not a case where guilt was demonstrated by overwhelming proof, and these declarations, accord-

1. That he would have to call his man to set up the deal. (54, 64)

ingly, cannot be considered as merely cumulative additions. See United States v. Cafaro, 455 F.2d 323 (2d Cir., 1972), cert. denied 92 S.Ct. 1759.

POINT IV

THE USE OF THE HEARSAY DECLARATIONS OF ALLEGED CO-CONSPIRATORS DENIED APPELLANT HIS SIXTH AMENDMENT RIGHT OF CONFRONTATION

While the Supreme Court has characterized the co-conspirators rule as a hearsay exception, Krulewitch v. United States, 336 U.S. 440 (1949), it has not directly decided the validity of that exception as regards the right to confrontation.

> Appellee does not challenge and we do not question the validity of the co-conspirator exception applied in the federal courts. Dutton v. Evans, 400 U.S. 74, 80 (1970).

This court struggled with this question in United States v. Puco, 476 F.2d 1099 (2d Cir., 1973), cert. denied 409 U.S. 882. This court, while rejecting Puco's claim accepted the premise that the scope of the exception should be judged on a case to case basis. United States v. Puco, supra.

Appellant contends that this case is distinguishable from Puco and that to have allowed the use of the co-conspirators exception denied appellant his Sixth Amendment right to confrontation.

This court in Puco properly reflected the Supreme Court's growing concern over the relationship between the rules of evidence regarding exceptions to hearsay and the right of confrontation set out in the Sixth Amendment. See, Pointer v. Texas, 380 U.S. 400

(1965); Dutton v. Evans, 400 U.S. 74 (1970); California v. Green, 399 U.S. 149 (1970); Barber v. Page, 390 U.S. 719 (1968).

This case presents a different situation than Puco. Applying the rules set out in Puco to this case requires a finding that McKethan's Sixth Amendment right to confrontation was denied to him.

In Puco, the following test was set forth:

> ...when a co-conspirator's out of court statement is sought to be offered without producing him, the trial judge must determine whether, in the circumstances, that statement bears sufficient indicia of reliability to assure the trier of fact an ad-quate basis for evaluating the truth of the declaration in the absence of any cross-examination. Id. at 1107.

It is true, that in the usual case, "utterances of co-conspirators carry such indicia because they are spontaneous and because they are against penal interest. Here, the hearsay statements that Anthony Simon would have to call his man were made under circumstances which make it unclear.whether Anthony was speaking of his brother or some other person (54, 64). It may be argued that this goes to weight and not admissibility. However, where some indicia of reliability is required for admissibility, the implications of the statements must be clear enough to evaluate the reliability. Here, they are not and they should not have been received in evidence.

POINT V

THE PROSECUTOR'S SUMMATION WAS IMPROPER.

During summation, the prosecutor stated:

> Mr. McKethan said, "Who are you, man? I didn't do nothing. Where is the stuff?"
>
> That to me, would mean one thing only: "I don't have the narcotics on me. You can't arrest me. The narcotics are up with Tony Simon. (170).

This post-arrest statement, was conceded by all the parties to be crucial to the case. Without it, the Court below felt there was no case.

It was highly improper for the prosecutor to inject his personal feelings as to what this somewhat ambiguous statement meant. These remarks clearly were based upon personal knowledge and prior experience, as well as the prosecutor's position as a representative of the government.

The expression by the prosecution of personal beliefs has been frequently criticized. e.g., United States v. Drummond, 481 F.2d 62 (2d Cir., 1973); United States v. Gonzalez, 488 F.2d 833 (2d Cir., 1973); United States v. Ludwig, 508 F.2d 140 (10th Cir.,1974) Gass v. United States, 416 F.2d 767 (CAD, 1969); Gradsky v. United States, 373 F.2d 706 (5th Cir., 1967); United States v. Handman, 447 F.2d 853 (7th Cir., 1971).

In the context of this brief trial the impropriety assumes greater impact. United States v. White, 486 F.2d 204 (2d Cir.1973). Moreover, the concedely crucial nature of this statement precludes a finding of harmless error. This was not a case of overwhelming

proof of guilt.[2]

It is true, that defense counsel did not object, but in the context of this case the impropriety still requires a reversal. cf. United States v. Ludwig, 508 F.2d 140 (10th Cir., 1974).

CONCLUSION

THE JUDGMENT OF CONVICTION SHOULD BE REVERSED.

Respectfully submitted,

GOLDBERGER, FELDMAN & BREITBART
Attorneys for Appellant

2. All the parties agreed that without this statement by McKethan, there was no case.

STATE OF NEW YORK)
: SS.
COUNTY OF RICHMOND)

ROBERT BAILEY, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N.Y. 10302. That on the 24 day of March, 1975 deponent served the within Brief upon U.S. Attorney

attonrye(s) for Appellee

in this action, at Foley Sq.
New York, NY.

the address(es) designated by said attorney(s) for that purpose by depositing 3 true copies of same enclosed in a postpaid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States post office department within the State of New York.

.....
ROBERT BAILEY

Sworn to before me, this
24 day of March, 1975.
William Bailey

WILLIAM BAILEY
Notary Public, State of New York
No. 43-0132945
Qualified in Richmond County
Commission Expires March 30, 1976